that goal." On the issue of minimal restrictiveness, the state fails completely. The intention of the CAN-SPAM Act is to balance the legitimate interests of the internet-using public and those of businesses legally sending commercial email to advertise their goods and services. The act provides remedies, including criminal penalties, for the violation of the CAN-SPAM Act. The university did not avail itself of the remedial measures in the Texas anti-spam act nor the federal CAN-SPAM Act but rather undertook to arbitrarily block **ALL** commercial messages whether legally sent or illegally sent. Petitioner asserts that those messages illegally sent can be and may be blocked by the university. However, under *Central Hudson*, legal messages should be allowed to reach the intended recipient. In this case, the university knew, in advance, that Petitioner's messages were legally sent and compliant with state and federal law and chose to block them anyway. The irony is that the illegal "spammers" simply spoof their headers, change isp's, obfuscate, etc. and continue to violate the law because it is difficult to find and stop them. Legally operated companies like Petitioner are easily found and because Petitioner did not hide, spoof or try to evade the law, was found, blocked and penalized for its compliance with the law. This cockeyed result cannot be what Congress intended when the CAN-SPAM Act was enacted and cannot be what this honorable Court intended when it ruled in *Central Hudson*.

Logically and most reasonably, the ultimate recipient of the email, the student, staff or faculty member of the university, is in the best position to "block" future messages. See Appendix C for a copy of the university's May 11, 2003 statement of its "non"-policy concerning "First Amendment Rights" and "spam." The university in this

document gives university users four methods for dealing with unwanted email. In the instant case, the recipient need only click "unsubscribe" and **NEVER** receive another message from Petitioner or any other CAN-SPAM compliant business. With this ability of the end user to unsubscribe from unwanted, legally sent messages, the university could block all illegal spammers and should allow all legal, CAN-SPAM Act compliant commercial messages to be delivered to and received by the targeted recipient. This practice would be Constitutional under *Central Hudson*, compliant with CAN-SPAM and would be the least restrictive policy of the university with which to attend to its legitimate concerns, the legitimate concerns of the business community and the extraordinarily important and fundamental guarantees of the First Amendment with regard to commercial speech.

At a status conference on March 9, 2004, which without objection by either party became oral argument on the pending cross motions for summary judgment, the District Court did inquire as to whether or not it could grant Petitioner's relief, not to be blocked by the university's information technology systems, without opening the system to all bulk emailers. The university replied that it could be so done (RA Vol.3, p. 21). In *Ashcroft*, this honorable court wrote that the state must rebut contentions that a less restrictive action is plausible (542 U.S. 656). In the instant case, not only did the state not rebut, it agreed that the relief sought by the Petitioner was not merely "plausible", but doable. Accordingly, less restrictive means are available and should be undertaken by the university.

If the state's "policy" to block **ALL** commercial speech is blanket suppression, as Petitioner contends, then it runs afoul of this honorable court's declaration in *Central Hudson* that, "We have rejected the highly paternalistic view that government has the complete power to suppress or regulate commercial speech". (65 L.Ed. 2d 341, 349).

The university community includes over 70,000 persons. In addition to the email system, the university operates an on-campus telephone system and U.S. postal mail drops for faculty, staff and students living on campus. By analogy, if the opinion of the Fifth Circuit were to stand as the law of the land, conceivably, the university could block legally-made telemarketer's calls through the university operated telephone network and could declined to deliver legally posted bulk mail through its U.S. postal drop system. The university could claim that these activities are a "burden" on its system and that the university's infrastructure is for "educational purposes" only and not in support of commercial enterprises. Furthermore, and not completely understood by either the District Court or the Fifth Circuit, the university, if this decision stands, and by analogy, could choose to block out-going telephone calls and postal mail from its on-campus phone network and mail drops respectively, to businesses or other entities the university deems "inappropriate" either in retaliation or again because these activities place a non-educational burden on university systems. This state of affairs would obviously not withstand constitutional muster. And yet, because the current case involves "spam", we somehow discount the value of the communication and the protections it deserves. The university chose to block on-campus users' access to Petitioner's website and to block email messages from on-campus users to Petitioner. Some of

these on-campus users were customers with whom Petitioner could not communicate because of the university's actions. Under what authority may a public university arbitrarily decide to block on-campus users from visiting and using a website on the world-wide web? Does this behavior not violate our constitutionally protected right of association?

The university, through its actions and policies, has framed this as a First Amendment issue, involving commercial speech and has asserted that *Central Hudson* applies; Petitioner agrees. As has been shown, the university's actions do not meet the *Central Hudson* test for constitutionality. The regulation it has articulated is a declaration that it is reasonable to block both legally sent and illegally sent commercial email, clearing in violation of the Supreme Court's position on "highly paternalistic" rules; and this policy in its application is selective, overreaching and amounts to "blanket suppression" of Constitutionally protected speech.

Federal Preemption Argument

As a wholly independent and sufficient basis for granting Petitioner's Petition for a Writ of Certiorari, Petitioner asserts federal preemption. Congress has recently enacted legislation, the CAN-SPAM Act, 15 U.S.C. §§ 7701 et seq. The law defines criminal behavior, establishes remedies and sets penalties for the sending of illegal spam. The law also provides specific guidelines for law-abiding citizens to follow to stay within the law and free from prosecution. In its findings, as stated in the law itself, not merely in the legislative history, Congress declares:

> (11) Many states have enacted legislation intended to regulate or reduce unsolicited electronic email, but these statutes impose different standards and requirements. As a result, they do not appear to have been successful in addressing the problems associated with unsolicited commercial electronic mail, in part because, since an electronic mail address does not specify a geographic location, *it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply.* (emphasis added). 15 U.S.C. § 7701(a)(11).

To address this problem, the federal statute provides:

> (b) STATE LAW –
>
> (1) IN GENERAL – This Act supersedes any statute, regulation or rule of a State of political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation or rule, prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto. 15 U.S.C. § 7707(b)(1).

Congress intended to establish one set of laws, rules and regulations to govern how commercial email may be legally sent and to prosecute violators. This law gives recipients of commercial email up to three methods to unsubscribe from future advertisements. Having seen the message once, no email recipient need ever see another unwanted email message from that legally operated business. In order for Congress' intention to be given full voice, the preemption clause must be enforced against the university as a subdivision of government, otherwise the

unifying, clarifying and balancing purposes of the Act will have been destroyed.

The Fifth Circuit found that the university is an internet service provider as that term is defined under the Internet Tax Freedom Act and the CAN-SPAM Act and therefore not subject to the preemption clause. The university cannot have it both ways. On the one hand, they claim that they are an institution of higher learning, a subdivision of government, not in "business" and not subject to taxes; on the other hand, it claims that it is an internet service provider under the Internet Tax Freedom Act and therefore not subject to the federal preemption clause. The university provides email and internet access at no charge, it is **NOT** in the business of providing internet access but rather educational services and it is most definitely a subdivision of government. Petitioner concedes that private entities are not subject to the preemption clause and it is clear that Congress wanted one uniform law to regulate the distribution of legal commercial email and the punishment of illegal spammers.

If the university can exempt itself from this law's preemption language, the ramifications for future claims of exemption from Federal preemption clauses are vast. As universities have become cities within cities, they may simply claim that they are internet service providers today, landlords tomorrow, landscaping services the next, restaurants after that, etc. The university is an institution of higher education. The fact that universities provide internet services or food services or housing does not change their core characters and the university should not be permitted to use fancy lawyering to pick and choose which laws to apply to itself. Private internet service

providers are free to operate as they like. However, public universities, funded at taxpayer expense, are subject to the Constitution and may not claim a convenient status for expediency sake.

The university concedes it is a state agency and has stated it does not consider Petitioner's emails to be false or fraudulent. The extent of this preemption is sweeping. It applies to states, agencies, subdivisions, statutes, rules and regulations. Assuming the State were to meet all of the *Central Hudson* criteria, its "policy," "rule" or "regulation" is preempted because Congress has consumed this area except when deception or falsity is involved.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
for the Fifth Circuit

No. 04-50362

White Buffalo Ventures, LLC,

Plaintiff-Appellant,

VERSUS

University of Texas at Austin,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(Filed August 2, 2005)

Before DAVIS, SMITH and DEMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This case involves the regulation of unsolicited, commercial mass electronic messages ("emails") (a species belonging to the larger communication genus often referred to as "spam").[1] Plaintiff White Buffalo Ventures,

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[1] Because the term "spam" is often thought of pejoratively, it is important to note that although that term necessarily implies that the email was unsolicited, the more general meaning does not (1) imply anything about the veracity of the information contained in the email; (2) require that the entity sending it be properly identified or authenticated; or (3) require that the email, even if true, be commercial in

(Continued on following page)

LLC ("White Buffalo"), operates several online dating services, including longhornsingles.com, which targets students at the University of Texas at Austin ("UT"). Pursuant to its internal anti-solicitation policy,[2] UT blocked White Buffalo's attempts to send unsolicited bulk commercial email.

White Buffalo sought to enjoin UT from excluding its incoming email. The district court denied the injunction. On cross-motions for summary judgment, the court granted UT's motion and denied White Buffalo's. White Buffalo appeals, challenging the ruling on the grounds that federal law preempts UT's internal anti-spam policy

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character. There nonetheless appears to be no consensus as to the precise meaning of the term "spam," which is sometimes used synonymously with unsolicited "bulk" email. A set of spam messages sent out together is called an email "blast."

The term "spam" derives from a 1970 Monty Python Flying Circus sketch in which a waitress recites a menu containing "egg and spam; egg bacon and spam; egg bacon sausage and spam; spam bacon sausage and spam; spam egg spam spam bacon and spam; spam sausage spam spam bacon spam tomato and spam. . . . " *e* Roger Allen Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM ACT*, 72 U. CHI. L. REV. 355, 355 n.1 (2005) (citing DAVID CRYSTAL, LANGUAGE AND THE INTERNET 53 (Cambridge 2001)).

[2] UT has a general policy against solicitation, which it articulates in the Rules and Regulations of the Board of Regents of the University of Texas System ("the Regents"). Pursuant to that policy, UT, with limited exceptions, prohibits solicitation at and on its facilities and has promulgated specific procedures dealing with unsolicited email communications, including commercial solicitations. Under these procedures, when unsolicited email communications come to the attention of university network administrators (by way of complaints, system monitors, or other means), UT takes steps to block or otherwise stop the transmission of such emails, with or without notice to the sender, as circumstances permit or warrant.

(the "Regents' Rules")[3] and that the policy violates the First Amendment. Mindful that this case presents several novel issues, the significance of which will grow proportionally with heightened cultural and economic reliance on the Internet, we affirm.

We make two determinations. First, we decide that the CAN-SPAM Act does not preempt UT's anti-spam policy. Second, we determine that the policy is permissible under our First Amendment commercial speech jurisprudence, but we reserve judgment on whether state university email servers constitute public or private fora.

I.

A.

The parties do not dispute the facts. UT provides, free of charge, Internet access and email addresses to faculty, staff, and students at the domain "utexas.edu." Owners of electronic mail accounts can access those accounts either on-grounds (by means of wireless connections or of wired, authenticated clusters) or remotely (by means of some other Internet access provider). An owner of a UT user account may, for example, log on from any third-party dial-up or broadband service provider and check for email residing on one of UT's 178 email servers.

UT has a policy of blocking many types of incoming spam, irrespective of commercial content or source

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[3] Specifically, White Buffalo contends that UT's regulations are preempted by the Controlling the Assault of Non-Solicited Pornography and Marketings Act of 2003 (the "CAN-SPAM Act" or the "Act"), 15 U.S.C. §§ 7701-7713, Pub.L. 108-187, 117 Stat. 2619 (2003).

authenticity. Under the Regents' Rules, the technology department (the "ITC") implements procedures (1) to block incoming unsolicited, commercial emails and (2) to stop the transmission of such emails.[4]

White Buffalo operates several online dating services, including one, called "longhornsingles.com," that targets UT students. In February 2003, White Buffalo submitted a Public Information Act request seeking all "non-confidential, non-exempt email addresses" held by UT, which responded by disclosing all qualifying email addresses. In April 2003, White Buffalo began sending legal commercial spam to targeted members of the UT community.[5]

UT received several complaints regarding unsolicited email blasts from White Buffalo. UT investigated and determined that White Buffalo had indeed sent unsolicited emails to tens of thousands of UT email account-holders, at which point UT issued a cease and desist letter. White Buffalo refused to comply with that letter, so UT blocked all email ingress from the IP address[6] that was the source

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[4] These procedures may or may not provide notice to the sender, depending on the circumstances.

[5] We presume the legality of these emails based on this record, the parties' agreement, and the absence of any challenge.

[6] An Internet Protocol ("IP") address is a unique 32-bit numeric address, written as numerals separated by periods, identifying each sender or receiver of information traveling across the Internet. An IP address has two parts: the identifier of a particular network on the Internet (say, the first 24 bits) and an identifier of the particular device (which can be a server or a workstation) within that network. In essence, an IP address identifies a single computer; that computer might be an entry point into an internal network, but that is not important for our purposes.

address for the unsolicited White Buffalo spam. The filter blocked all email sent from that IP address to addresses containing the "@utexas.edu" string.

B.

White Buffalo obtained a temporary restraining order ("TRO") in state court. UT removed the cause to federal court on the basis of federal question jurisdiction; there the TRO was continued pending a hearing on the preliminary injunction. After a hearing in May 2003, the district court denied the injunction. The parties conducted discovery, and both moved for summary judgment. The district court granted UT's summary judgment motion and denied White Buffalo's.

II.

A.

1.

This court reviews a summary judgment grant *de novo*, in accordance with the Fed R. Civ. Proc. 56 analysis that guides the district court. *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001). The district court entered judgment for UT on cross-motions for summary judgment. On review, the motions are reviewed independently, with evidence and inferences taken in the light most favorable to the nonmoving party. *See id.* We review a district court's preemption determinations *de novo*. *See Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 278 (5th Cir.1994).

2.

The doctrine of preemption stems from the Supremacy Clause,[7] which gives federal law precedence over a conflicting state law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). CAN-SPAM's preemption of state law derives from an express provision in the Act. *See* 15 U.S.C. § 7707(b).

Although a court should begin with the expression provided by Congress, it must also "identify the domain expressly pre-empted."[8] The fact that Congress has expressly preempted certain activity is plain, but the scope of that express preemption is not. The power to supplant state law is "an extraordinary power in a federalist system." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Preemption radically alters the balance of state and federal authority, so the Supreme Court has historically refused to impose that alteration interstitially. *See id.* The Court has expressed this principle as a presumption against preemption of state law.[9] Supremacy Clause analysis is classic "tie goes to the state" jurisprudence, and the existence of an express preemption provision does not always plainly demarcate what the federal law expressly preempts.

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[7] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land. . . ." U.S. CONST. art. VI, cl. 2.

[8] *Cipollone*, 505 U.S. at 517; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996).

[9] *See Cipollone*, 505 U.S. at 517-18; *see also Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224 (1993) ("We are reluctant to infer preemption. . . ."); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.").

3.

The district court granted summary judgment to UT on White Buffalo's claim that the CAN-SPAM Act preempts ITC's anti-spam regulations. The court premised its holding on four propositions: (1) that the "purposes" of CAN-SPAM, as determined by reference to the statute and the accompanying Senate Report, suggest that Congress did not mean to preempt technological approaches to combating spam; (2) that § 7707(c) specifically exempts UT from the scope of express preemption; (3) that § 7707(b)(2), which states that "[s]tate laws not specific to electronic mail, including State trespass, contract, or tort law" are not preempted, exempts UT's anti-spam policy because that policy is part of a larger set of anti-solicitation rules; and (4) that UT's ITS policy is not a "statute, regulation, or rule of a State or political subdivision of a state" and is therefore not preempted by § 7707(b)(1). We do not organize our discussion around these four propositions (because the appellate briefing renders an alternate organization more desirable), but we discuss each in its appropriate context.

To our knowledge, no Fifth Circuit panel has scrutinized any portion of CAN-SPAM, and no court in this country has considered the legislation's preemption clause. This is therefore an issue of very, very first impression.

In part, CAN-SPAM prohibits fraudulent, abusive and deceptive commercial email, 15 U.S.C. §§ 7703, 7704; provides for enforcement of the Act by federal agencies, states, and Internet service providers ("ISPs"), *id.* § 7706; and provides for the issuance of regulations to implement the purposes of the Act, *id.* § 7711. The parties have agreed, in the district court and on appeal, that White

Buffalo complied with the requirements of the CAN-SPAM Act. Its email blasts were not unlawful.

Most relevant to White Buffalo's claim is CAN-SPAM'S preemption clause:

> This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

§ 7707(b)(1).

White Buffalo argues that this preemption clause prevents UT from promulgating regulations to impede the ingress of longhornsingles.com emails to utexas.edu users. According to White Buffalo, because UT is a state actor and has conceded that White Buffalo's spam is not false or fraudulent, CAN-SPAM preempts the Regents' Rules authorizing the email filters. White Buffalo provides no authority beyond § 7707(b)(1) in support of this position.

Matters become more complicated because, in addition to setting forth the preemption clause, § 7707 carves out a set of entities to be exempt from any possible preemptive effect. It states that "[n]othing in this chapter shall be construed to have any effect on the lawfulness or unlawfulness . . . of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages." § 7707(c).

The district court held that CAN-SPAM does not preempt UT's anti-solicitation policy. It noted that § 7707(c) permits Internet service providers to employ protection measures, and it held that UT belongs to that set of service providers. The court also relied on Congress's acknowledgment of "the problems associated with the rapid growth and abuse of unsolicited commercial email [that] cannot be solved by Federal legislation alone" but that will also require the "development and adoption of technological approaches" to serve the goals of the Act. *See* 15 U.S.C. § 7701(a)(12). The court found that "[t]he Act . . . does not preclude a state entity like UT from using technological devices [such as] spam-filters to conserve server space and safeguard the time and resources of its employees, students, and faculty." *White Buffalo Ventures, LLC v. Univ. of Tex. at Austin*, No. A-03-CA-296-SS, 2004 WL 1854168, at (W.D. Tex. Mar. 22, 2004).

There are two competing interpretations, both rooted firmly in the text of the Act, of the degree of authority state actors may wield in response to commercial spam. Under the first, state entities may not regulate commercial speech except where that regulation relates to the authenticity of the speech's source and content. Under the second, state entities may implement a variety of non-authenticity related commercial speech restrictions, provided the state entity implementing them is an "Internet access provider."

As a result of Congress's apparent failure to contemplate this question, we must not infer preemption. The textual ambiguity triggers the strong presumption against such a finding, and we cannot be sure whether UT's regulations fall within the ambit of the express preemption

clause. UT may therefore implement the Regents' Rules without violating the Supremacy Clause.

B.

1.

UT argues that CAN-SPAM does not preempt the ITC policy (1) because the Act does not displace the state's ability to supplement federal law and (2) because CAN-SPAM preempts state rules that relate to the *sending*, rather than the *receipt*, of unsolicited commercial emails. Section 7707(b)(1) carefully specifies state political subdivisions as falling within the scope of its preemption, and UT is a public school.[10]

In a vacuum, the provision is explicit about the types of policies CAN-SPAM preempts. In layman's terms, state entities may not regulate the use of electronic mail to send commercial spam except where those rules relate to source and content authenticity. UT emphasizes Congress's choice to use the word "send" in the statute. As a result, UT argues, CAN-SPAM does not preempt its regulation of "received" emails. We decline to imbue the word "send" with the particular significance UT urges.[11]

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[10] UT argues that ITS is not a political subdivision of the state. This argument is meritless, as we explain in part II.B.3, *infra*.

[11] UT posits that CAN-SPAM regulates not the "receipt" of email, but the "sending" of it. UT then contends that the Regents' Rules control the "receipt" of email. Section 7707(b)(1) preempts state law regulating "the use of electronic mail to send commercial messages." All email (and all "snail mail," for that matter) is both "sent" and "received."

The event triggering preemption is that the email was sent, not the particular identity of the entity sending it. We do not mean to say that

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2.

CAN-SPAM does not preempt the Regents' Rules, because § 7701(b)(1) is in tension with plain text found elsewhere in the Act, and that tension triggers the presumption against preemption. The district court properly sought to interpret § 7707(c), which reads, "Nothing in this Act shall be construed to have any effect on the lawfulness or unlawfulness ... of the adoption, implementation, or enforcement by a provider of Internet Access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages." In finding no express preemption, the court both (1) averred that the ITC policy may not constitute a "statute, regulation, or rule of a State or political subdivision of a state," § 7707(b)(1), and (2) noted that UT is a "provider of Internet access." Any suggestion along the lines of (1) – that an ITC policy does not constitute a policy of a state subdivision – is incorrect and requires little explanation. ITC implements the directives of, and operates pursuant to the authority of, the Board of Regents; its policies therefore constitute rules of a state subdivision.[12]

We therefore confine ourselves primarily to the discussion of (2). The district court stated that "UT is certainly a provider of Internet access service to its

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"send" and "receive" never have more specialized meanings in the statute, but only that the grammatical construction of this particular provision suggests emphasis should not be placed on that distinction here.

[12] In a related passage, the district court stated that "the Board of [Regents] Rules governing solicitation using university facilities cannot be said to be specific to electronic mail since it regulates all forms of solicitation." We need not decide this issue, because we have alternate grounds of making our preemption decision.

students, if not to its employees and faculty, so it is expressly authorized under the statute to implement policies declining to transmit, route, relay, handle or store spam."

The district court says "certainly" without any reference to the definition provided in the statute. Congress, in fact, imports that definition wholesale from a statutory predecessor, the Internet Tax Freedom Act: "[A] service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as a part of a package of services offered to consumers." 47 U.S.C. § 151.

We doubt that those legislators responsible for passing the Internet Tax Freedom Act gave serious consideration to the situation the instant facts present. UT indeed provides Internet Access Service – any time somebody sits down at a computer terminal on campus – but users need not check their UT email from UT network computers, because they can access the email server remotely. Nonetheless, status as an "Internet Access Provider" does not appear to turn on the fraction of access conducted remotely, and we are hard-pressed to find that providing email accounts and email access does not bring UT within the statutory definition borrowed from the Internet Tax Freedom Act.[13] We therefore decide that UT falls within the ambit of § 7707(c).

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[13] It would be an unusual policy to allow private, but not public, educational institutions to act as custodians for the interests of its online community. The prudence of the policy, however, does not drive our determination that UT should be considered an Internet Access Provider under the Act.

D.

We analyze this issue using a Venn diagram,[14] the intersecting area of which Congress did not anticipate – where the state entity is itself the provider of Internet access. In that area resides activity that Congress has both expressly preempted and expressly excepted from preemption analysis. Such tension, created by the text of the statute, leaves us unwilling to overrule the strong presumption against preemption. The Regents Rules are valid under the Supremacy Clause.

III.

A.

White Buffalo contends that the district court erred in granting summary judgment on its First Amendment claim. Whether UT has violated White Buffalo's First Amendment rights turns on the resolution of the four-part commercial speech test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). We review First Amendment determinations under the commercial speech doctrine *de novo*. *See Moore v. Morales*, 63 F.3d 358, 361 (5th Cir.1995). Resolving this issue in favor of UT, we decline to reach the issue of whether UT's email servers constitute public fora.[15]

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[14] A Venn diagram uses circles to represent sets, with the position and overlap of the circles indicating the relationships between the sets.

[15] In other words, we consider two hypothetical situations: one in which the UT servers are public fora, and one in which they are not. If the servers are not, then the First Amendment question is easily resolved – if a server is a private forum, the government may regulate the speech so long as it is viewpoint-neutral. In the alternative, if a server is a public forum, we apply *Central Hudson*. If we determine that

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B.

Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. No one seriously disputes the commercial character of the speech at issue here.

In *Central Hudson*, the Court invalidated portions of state regulations banning commercial advertising that promoted the use of electricity. *See id.* at 572. The Court determined that the government's action was more extensive than necessary to promote the state's substantial interest in energy conservation. *Id.* at 569-70. In so doing, the Court announced a four-part test to evaluate the legality of commercial speech regulation: (1) whether the speech is unlawful or misleading; (2) whether the government's expressed interest is substantial; (3) whether the state action directly promotes that interest; and (4) whether the state action is more extensive than necessary to promote that interest. *See id.* at 566.

1.

Under the first *Central Hudson* prong, we must determine whether the speech is unlawful or misleading. *See id.* Both parties agree that White Buffalo's commercial solicitations are legal and that they contain factually accurate information.

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this particular regulation would satisfy either situation, we need not resolve the dicey but admittedly important question of the public versus private forum status of public university email servers.

2.

Under the second *Central Hudson* prong we must assess the "substantiality" of the government's proffered interests. *See id.* UT advances two primary interests: (1) safeguarding the time and interests of those with UT email accounts ("*user* efficiency") and (2) protecting the efficiency of its networks and servers ("*server* efficiency"). We distinguish between the two interests for reasons that are important under the fourth prong of the *Central Hudson* analysis.

For purposes of evaluating the summary judgment, we acknowledge as substantial the government's gatekeeping interest in protecting users of its email network from the hassle associated with unwanted spam. Also substantial is the "server efficiency" interest, but it must independently satisfy a "goodness of fit" inquiry under the fourth prong of *Central Hudson*. "Suffer the servers" is among the most chronically over-used and under-substantiated interests asserted by parties (both government and private ones)[16] involved in Internet litigation, and rules imposed pursuant to such interests require more than a judicial rubber-stamp, for reasons we explain in part III.B.4.b, *infra*.

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[16] The opinion in *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F.Supp.2d 1058 (N.D.Cal.2000), is one of the first and perhaps the most conspicuous instance of this rationale. The *eBay* court held, on a trespass to chattels theory, that if the defendants crawling "activity is allowed to continue unchecked, it would encourage other auction aggregators to engage in similar recursive searching of the eBay system such that eBay would suffer irreparable harm from reduced system performance, system unavailability, or data losses." *Id.* at 1066. *See also* note 25, *infra*.

3.

Pursuant to the third *Central Hudson* prong, we must next determine whether the UT policy directly advances both proffered substantial interests: (1) UT's interest in sanitizing the network for its email account-holders (*user* efficiency) and (2) its interest in preserving the operating efficiency of its servers (*server* efficiency). *See id.* at 569. Again, there can be no serious dispute that UT's anti-spam policy, which blocks specific incoming commercial spam after account-holders have complained about it, directly advances both interests. One can hardly imagine a more direct means of preventing commercial spam from appearing in account-holders' inboxes and occupying server space than promulgating a policy that excludes such material from the email network.[17]

4.

Having resolved the first three *Central Hudson* questions in UT's favor, we must finally conduct the most difficult inquiry – whether the ITC policy is no more extensive than necessary to achieve at least one of the two substantial state interests. *See id.* at 569-70.[18] White Buffalo contends that UT's anti-spam policy fails to meet this final requirement, although White Buffalo's precise objection is hard to discern. It appears to protest the over-restrictiveness of the policy on the ground that it

[17] Neither party provides caselaw in support of its position on the question of substantial interest. The district court relied on extensive comments in the Senate Report offered in support of the CAN-SPAM Act.

[18] For an explanation as to why only one substantial interest need be satisfied, *see* part III.C, *infra*.

is impossible to articulate precisely what the UT regulation is.

To the contrary, UT (relying on the district court's disposition of the issue) reasons that the policy is narrowly and specifically drawn to protect the system and users from only those unsolicited, commercial emails that have been identified as problematic by complaint, system monitors, or other means. The restriction is tailored by blocking only those emails from specifically identified ISP addresses. Although we may not agree with all of UT's characterizations of its policy, we are aware of what that policy *is*. White Buffalo's objection in this regard is without merit.

a.

With respect to the first proffered substantial state interest, which is promoting *user* efficiency,[19] the ITC policy is no more extensive than necessary. We have little problem affirming the proposition that, to keep community members from wasting time identifying, deleting, and blocking unwanted spam, UT may block otherwise lawful commercial spam (as long as the blocks are content-and viewpoint-neutral).[20]

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[19] By "user efficiency" we mean the ability of UT email account holders to go about their daily business without constantly having to identify and delete unwanted commercial spam.

[20] UT Vice President of Information Technology Daniel Updegrove testified at the May 20, 2003, preliminary injunction hearing:

> [A]t a minimum there's the time it takes to configure an e-mail filter, running the risk that legitimate messages will be filtered erroneously or one by one deleting the offending messages. And

(Continued on following page)

b.

We reject, however, the proposition that the ITC policy is no more extensive than necessary to secure the state's second substantial interest, which is the efficiency of its *servers*.[21] One might persuasively present evidence that spam, taken in its entirety, affects the efficiency of email servers; indeed, that appears to be what UT has proffered; it submits a list of between 1,500 and 2,000 blocked IP

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there's an ongoing question of how much of this message you have to actually encounter in order to decide that it's spam.

He furthered affirmed that if UT "wasn't allowed to block or was somehow required under the Constitution to unblock these 1700 some odd sites, that it would severely degrade an employee's ability to do their job[.]"

[21] This "poor fit" could be rephrased as an objection under several other *Central Hudson* prongs. For example, the Supreme Court has made a similar analysis under the third prong. In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999), the Court stated:

> The third part of the *Central Hudson* test asks whether the speech restriction directly and materially advances the asserted governmental interest. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Consequently, the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. We have observed that this requirement is critical; otherwise, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

(Internal citations and quotation marks omitted.) The prong under which we make our observations matters little for *Central Hudson* analysis, however, because the Supreme Court has stated that "[a]ll are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three." *Id.* at 183, 119 S.Ct. 1923.

addresses.[22] Updegrove testified at the May 2003 Preliminary Injunction hearing that UT's "system" would not be able to function without these blocks. Such testimony is common where server efficiency is offered as a state or private interest in Internet litigation.

We must nonetheless consider the evidence in the light most favorable to the nonmovant. *See Ford Motor Co.*, 264 F.3d at 498. Moreover, the challenged regulation should indicate that its proponent "carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (internal citations and quotations omitted).

There is record testimony that White Buffalo can send a restricted volume of email at off-peak times, so as not to impede server efficiency. Moreover, UT's list of blocked IP addresses does not make any of the types of distinctions that Congress obviously thought important – distinctions between, say, (1) truthful commercial messages and obscene images, (2) commercial messages with an unsubscribe feature and commercial messages without one, (3) emails sent during peak traffic times and those that are not, and (4) email that originates from an authentic source and email that does not. The rub is that although the record demonstrates that unblocking all spam might compromise network efficiency, it says nothing about the effects of allowing lawful time- and volume-restricted commercial spam to enter UT's email network.

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[22] This information is contained in Exhibit 4. There are two constituent lists – one of blocks by host address and one of blocks by IP address.

An exchange at the preliminary injunction hearing between UT's attorney and Updegrove most vividly illustrates the poor fit between UT's restrictions and the substantial interest in *server* efficiency:

> Q: Well, [White Buffalo's attorney] is saying, well, "Hey, I can send this at night when the employees aren't there. I won't send too many at one time. It won't affect your system that much because of that. Now, is there a reason why that's not an acceptable proposition."
>
> A: Well, if something is wrong, just because there's a little bit of it doesn't make it right. If a university makes resources available, misusing a little bit of those resources isn't correct.

For the *server* efficiency rationale to pass muster under the fourth prong of *Central Hudson*, spam filters must block a set of spam that poses a legitimate threat to server efficiency.

This is not to say that UT need draw granular distinctions between types of spam where drawing them renders filtering economically infeasible.[23] It, however, is to say that where UT may easily use certain types of filters – e.g., time of day and volume filters – UT should use them rather than categorically exclude all unsolicited commercial bulk email. If those types of filters are economically infeasible, that evidence should be in the summary judgment record. The current record reflects only that UT does not employ such filters because legal spammers are

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[23] For example, as Updegrove testifies, it would be impossible to filter spam based on whether the originator of the email was a legitimate business. The email filters could not automate this task.

subjectively "misusing" the system, not because they are overburdening it.

Our conclusion that, for summary judgment purposes, there is an insufficient fit between the ITC policy and the asserted interest in *server* efficiency is of little moment in the spam context. The *server* efficiency interest is almost always coextensive with the *user* efficiency interest, and the fit is sufficient for the latter; but declaring server integrity to be a substantial interest without evidentiary substantiation might have unforseen and undesirable ramifications in other online contexts.[24]

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[24] This is no more than a cautionary note, the importance of which has become more plain as a result of our increasing familiarity with litigation involving the Internet. For example, in many of the "digital trespass" cases, where a plaintiff bases a trespass to chattels theory on a defendant's unauthorized use of a network/computer system, the court will merely conclude, without evidence or explanation, that the allegedly unauthorized use burdened the system.

One of the most prominent such statements occurs in *CompuServe v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) ("To the extent that defendants' multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff's computer equipment, those resources are not available to serve CompuServe subscribers. Therefore, the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants' conduct."). Many courts mention system degradation and perfunctorily cite *CompuServe*, but focus primarily on things such as decline in customer goodwill, worker productivity, and the like. *See, e.g., Am. Online, Inc. v. IMS*, 24 F.Supp.2d 548, 550 (E.D.Va.1998) ("[Plaintiff's] contact with [Defendant's] computer network was unauthorized; and [Plaintiff's] contact with [Defendant's] computer network injured [Defendant's] business goodwill and diminished the value of its possessory interest in its computer network."); *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp.2d 444, 452 (E.D.Va.1998) (citing *CompuServe* language).

Since *eBay* was issued, however, courts have become a little more circumspect about using the "slippery slope" argument. *See Ticketmaster*

(Continued on following page)

C.

A governmental entity may assert that a statute serves multiple interests, and only one of those need be substantial. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71-73 (1983). The ITC policy survives First Amendment scrutiny despite its failure to justify that policy in relationship to the *server* efficiency interest.

Corp. v. Tickets.Com, Inc., 2003 WL 21406289 (C.D. Cal. Mar.7, 2003) ("Since the spider does not cause physical injury to the chattel, there must be some evidence that the use or utility of the computer (or computer network) being 'spiderized' is adversely affected by the use of the spider. No such evidence is presented here. This court respectfully disagrees with other district courts' finding that mere use of a spider to enter a publicly available web site to gather information, without more, is sufficient to fulfill the harm requirement for trespass to chattels.").

This rationale, with little to no evidentiary substantiation, has likewise justified claims under the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030. *See, e.g., Hotmail Corp. v. Van$ Money Pie, Inc.*, 1998 WL 388389, ¶ 34 (N.D. Cal. Apr.16, 1998) (unpublished) ("The evidence supports a finding that plaintiff will likely prevail on its [CFAA] claim and that there are at least serious questions going to the merits of this claim in that plaintiff [including] that defendants took such actions [utilizing system capacity] knowing the risks caused thereby to Hotmail's computer system and online services, which include risks that Hotmail would be forced to withhold or delay the use of computer services to its legitimate subscribers; that defendants' actions caused damage to Hotmail; and that such actions were done by defendants without Hotmail's authorization."). Interestingly, the court conducting the most thorough inquiry into *actual* system damage did so in the process of declaring the issue to be one of triable fact, precluding summary review. *See Am. Online, Inc. v. Nat'l Health Care Discount, Inc.*, 121 F. Supp.2d 1255, 1275 (N.D. Iowa 2000). Even in the CFAA context, however, courts rely on the "loss" rather than the "damage" language in the statute. *See, e.g. EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 585 (1st Cir. 2001), a maneuver that almost mirrors courts' tendency to favor the *server* efficiency interest in name but the *user* efficiency interest in substance.

We therefore decide that UT's anti-spam policy is constitutionally permissible under *Central Hudson*. Because we so decide, we need not address what type of First Amendment forum a public university email network constitutes.

The summary judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHITE BUFFALO VENTURES, LLC

Plaintiff,

-vs-

THE UNIVERSITY OF TEXAS AT AUSTIN,

Defendant.

Case No. A-03-CA-296-SS

ORDER

(Filed Mar. 22, 2004)

BE IT REMEMBERED on the 9th day of March 2004 the Court called the above-styled cause for a hearing on all pending matters and the parties appeared through counsel. Before the Court were the Plaintiff's [#38] and Defendant's [#41] cross-motions for summary judgment and their respective responses thereto [#44, #45] as well as Plaintiff's Motion for Oral Argument of Its Motion for Summary Judgment [#46]. After the hearing each party filed a reply [#48, #49]. Having considered the summary judgment motions, responses, replies, relevant law, and the case file as a whole, the Court now enters the following opinion and orders.

Background

This is a case about unsolicited commercial email, commonly known as "spam." *See* S.Rep. No. 108-102, at 2 (2003), *reprinted in* 2004 U.S.C.C.A.N. 2348 (defining

"spam" as unsolicited commercial email).[1] The plaintiff in this lawsuit, White Buffalo Ventures, L.L.C. ("White Buffalo"), operates several online dating services, including LonghornSingles.com. In April of 2003, White Buffalo obtained a list of email addresses from University of Texas at Austin ("UT") pursuant to a request under the Texas Public Information Act. Shortly thereafter, White Buffalo sent approximately 55,000 unsolicited emails promoting LonghornSingles.com to members of the UT community with email addresses ending in "utexas.edu." Messages sent to email addresses ending in utexas.edu are stored on computer servers owned and operated by UT. UT has developed alarms and utilizes commercial spam filters that alert network systems operators when a large amount of email is coming from one source. White Buffalo's spam did not trigger an alarm and was not detected by UT filters. However, after UT officials received a number of complaints regarding the LonghornSingles.com spam, UT notified White Buffalo and asked the company to stop spamming utexas.edu addresses. White Buffalo declined to do so and therefore UT added a filter for all inbound traffic from IP address 207.195.226.25 on the UT network board router, thereby blocking any more email from LonghornSingles.com's IP address from reaching any of the 150

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[1] The same Senate Report recounts the origin of the term "spam," explaining " '[i]t all started in early Internet chat rooms and interactive fantasy games where someone repeating the same sentence of comment was said to be making a 'spam'. The term referred to a Monty Python's Flying Circus scene in which actors keep saying "Spam, Spam, Spam, and Spam' when reading options from a menu.' " S. Rep. No. 108-102, at n.1 (quoting April 5, 1999 edition of *Computerworld*).

plus email severs on the UT campus.[2] *See* Def.'s Mot. for Summ. J. Ex. A ("Updegrove Decl.") ¶ 4.

UT has a general anti-solicitation policy pursuant to which UT prohibits solicitation at and on UT facilities subject to certain exceptions. *See* Def.'s Mot. for Summ. J. Ex. A-1 (UT Bd. of Reagents' Rules & Regs., Pt. One, Ch. VI, "Student Services and Activities and Regulations on Facilities Use"); Updegrove Decl. ¶ 1. Pursuant to the Board of Reagent's Rules and Regulations regarding solicitation, UT Information Technology Services ("ITS") promulgated specific policies to curb spam targeted at UT community members. *See* Def.'s Mot. for Summ. J. Ex. A-2 ("UT ITS Anti-Spam Notices and Procedures") (stating the "online directory service is provided by the University to facilitate the research, teaching, learning, and service missions of the University Community" and because "[s]olicitation on computing and network resources if prohibited by the Rules and Regulations of the [UT] Board of Reagents . . . the contact information provided in this online directory service may not be used for transmission and distribution of unsolicited e-mail or other commercial purposes."); Updegrove Decl. ¶ 2. According to the anti-solicitation rules and anti-spam policy, UT takes steps to block or stop the transmission of unsolicited commercial email whenever such email is detected, whether by the system alarms or filters or by UT system user complaints. Updegrove Decl. ¶ 2. In addition to blocking the LonghornSingles.com IP address, UT has blocked more than 1000 email senders for failing to comply with UT's

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[2] Apparently, at one time UT was also blocking UT users' ability to access the LonghornSingles.com website from the UT network, but at the hearing the parties informed the Court this is no longer the case.

anti-spam policy and anti-solicitation rules. Updegrove Decl. ¶ 5. UT's evidence demonstrates it did not block LonghornSingles.com spam because of the service it promoted (online dating), it blocked the spam because it was spam – that is, unsolicited commercial email. Updegrove Decl. ¶ 5.

White Buffalo has sued the University of Texas at Austin ("UT") seeking to enjoin UT from blocking its mass commercial emails to UT students, faculty and staff. White Buffalo contends this Court should enjoin UT from blocking its spam because in blocking the LongHornSingles.com spam, UT has violated White Buffalo's free speech rights under the First Amendment and equal protection rights under the Fourteenth Amendment. Additionally, White Buffalo contends UT's anti-spam policy is preempted by the recently enacted federal law known as the Controlling the Assault of Non-Solicited Pornography and Marketings Act of 2003 (hereinafter, "the CAN-SPAM Act"), 15 U.S.C. § 7701 et seq.[3]

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[3] In addition to requesting injunctive relief and asserting the aforementioned constitutional and preemption claims, White Buffalo originally pled a tortious interference with contract claim against UT. UT moved for summary judgment on this claim on the grounds on the basis of its sovereign immunity from tort claims under Texas law. White Buffalo did not respond to UT's motion on this point and does not address its tort claim in its own motion for summary judgment and thus, apparently abandons the claim. Regardless, UT is entitled to summary judgment on the tortious interference with contract claim because it is immune. *See, e.g., University of Texas – Pan American v. De Los Santos*, 997 S.W.2d 817, 821 (Tex.App. – Corpus Christi 1999, no pet.) (holding university immune from state law tortious interference with contract claims).

Analysis

A. Summary Judgment Standard

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). In deciding summary judgment, the Court should "construe all facts and inferences in the light most favorable to the nonmoving party." *Hart v. O'Brien*, 127 F.3d 424, 435 (5th Cir.1997), *cert. denied*, 525 U.S. 1103 (1999). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir.1990) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

Both parties bear burdens of producing evidence in the summary judgment process. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). First, "[t]he moving party must show that, if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden of proof." *Hart*, 127 F.3d at 435 (citing *Celotex*, 477 U.S. at 327). The nonmoving party must then "set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings." *Id.* (citing Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 249). However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir.1996).

B. CAN-SPAM Act of 2003's Preemptive Effect

Last year, Congress enacted the CAN-SPAM Act, which took effect on January 1, 2004. 15 U.S.C. § 7701 (quoting 2003 Act. Pub.L. 108-187, § 16, Dec. 16, 2003, 117 Stat. 2719 in notes after § 7701). The purposes of the CAN-SPAM legislation are: (1) to prohibit spammers from deceiving email recipients and Internet Service Providers (ISPs) regarding the source or subject of the unsolicited commercial email messages; (2) to require spammers to give spam recipients an opportunity to decline to receive further emails from them and to honor the recipients' requests; (3) to require spammers include their valid physical address in their spam message and notice the message is an advertisement or solicitation; and to prohibit businesses from permitting the promotion of their business through false or misleading spam. S. Rep. 108-102 at 1. To that end, the CAN-SPAM Act prohibits spammers from sending deceptive or misleading information and using deceptive subject hearings, requires them to include return addresses in their email messages, and prohibits them from sending emails to a recipient after that recipient has indicated they do not wish to receive email messages from them. 15 U.S.C. § 7704(a). White Buffalo contends and UT does not dispute the mass commercial email messages White Buffalo sent and intends to send to UT comply with the CAN-SPAM Act and are therefore not illegal under the statute. But White Buffalo and UT disagree about the significance of the spam's compliance with the CAN-SPAM Act: White Buffalo maintains the Act preempts any state attempt to further regulate unsolicited electronic mail including UT's anti-spam policy, whereas UT contends even if White Buffalo's spam is not prohibited by the CAN-SPAM Act, nothing in

the Act prevents the university from filtering or blocking White Buffalo spam or any other spam.

White Buffalo bases its argument on the text of the CAN-SPAM Act itself, which specifically states it "supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent any such statute, regulation, or rules prohibits falsity or deception in any portion of a commercial mail message or information attached thereto." 15 U.S.C. § 7707(b)(1). White Buffalo argues this preemption language means UT cannot place any further limitations on unsolicited commercial email beyond those outlined in the CAN-SPAM Act. It is true Congress recognized email communication is inherently interstate in nature. *See* S. Rep. 108-102, at 21. Accordingly, Congress explicitly noted the ineffectiveness of piecemeal, state-by-state regulation of unsolicited commercial email and the burden it imposes on legitimate businesses that advertise through email to attempt to comply with various state laws when they most likely are unsure of the state of destination of many of the emails they send. *See* 15 U.S.C. § 7701(a)(11). As such, Congress explicitly noted "there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis." 15 U.S.C. § 7701(b)(1).

However, Congress also recognized the limitations of the CAN-SPAM Act, which White Buffalo's interpretation of the statute ignores. Specifically, Congress stated "the problems associated with the rapid growth and abuse of unsolicited commercial email cannot be solved by Federal legislation alone" and therefore, the "development and adoption of technological approaches . . . will be necessary as well." 15 U.S.C. § 7701(a)(12). Additionally, within the

section of the statute addressing preemption, the Act clarifies it does not preempt the applicability of "State laws not specific to electronic mail, including State trespass, contract, or tort law" or States laws regulating fraud or computer crime. 15 U.S.C. § 7707(b)(2). The statute further clarifies the CAN-SPAM Act should not be "construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages." 15 U.S.C. § 7707(c).

Each of these parts of the CAN-SPAM Act are relevant to this case. First of all, the Board of Reagents Rules governing solicitation using university facilities cannot be said to be specific to electronic mail since it regulates all forms of solicitation. *See* Def.'s Mot. for Summ. J. Ex. A-1 (UT Bd. of Reagents' Rules & Regs., Pt. One, Ch. VI, "Student Services and Activities and Regulations on Facilities Use"); *cf., e.g.*, TEX. BUS. & COM.CODE §§ 46.001-46.011 (explicitly regulating unsolicited commercial email). Furthermore, even though the UT ITS anti-spam policy obviously relates to commercial electronic mail, it is not clear an ITS policy is a "statute, regulation, or rule of a State or political subdivision of a State" and therefore preempted § 7707(b)(1). Even if were, however, UT is certainly a provider of Internet access service to its students, if not to its employees and faculty, and as such, is expressly authorized under the statute to implement policies declining to transmit, route, relay, handle or store spam. 15 U.S.C. § 7707(c).

In enacting the CAN-SPAM Act, Congress not only recognized the burdens imposed upon computer networks

of employers and universities by deceptive and illegal spam, Congress also recognized the burden imposed by the overwhelming volume of all spam (legitimate and illegitimate) being transmitted over the Internet. *See* S. Rep. 108-102, at 3 (noting "the sheer volume of spam is threatening to overwhelm not only the average consumer's inbox, but also the network systems of ISPs, businesses, universities, and other organizations."). As such, the Court cannot believe Congress intended this Act to prevent universities or local and state government agencies from blocking or filtering unsolicited commercial email. In contrast, if White Buffalo were prosecuted under the Texas anti-spam statute, TEX. BUS. & COM. CODE §§ 46.001-46.011, White Buffalo would surely be able to raise preemption as a defense and the state would be prevented from imposing penalties on White Buffalo if their spam complied with all provision of the CAN-SPAM Act.[4] The Act, however, does not preclude a state entity like UT from using technological devices like spam-filters to conserve server space and safeguard the time and resources of its employees, students, and faculty. *See* 15 U.S.C. § 7701(a)(12) (recognizing the needs to develop and adopt technology to combat the negative aspects of spam the federal legislation cannot address).

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[4] The State of Texas, however, is empowered to bring a civil action on behalf of the residents of a state against spammers that violate the provisions of the CAN-SPAM Act. *See* 15 U.S.C. § 7706(f). Additionally, ISPs can bring actions against spammers that violate the Act to enjoin their violations and for the money damages they incur due to the spammers' illegal behavior. *See* 15 U.S.C. § 7706(g).

C. Commercial Speech and *Central Hudson*

In addition to arguing UT's policies are preempted, White Buffalo argues UT is violating its rights under the First Amendment by blocking its spam to utexas.edu email addresses. Neither party disputes the unsolicited email White Buffalo sent promoting LonghornSingles.com constitutes commercial speech, which the Supreme Court has defined as "expression related solely to the economic interests of the speaker and its audience." *Commercial Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980). The First Amendment protects commercial speech, albeit to a lesser degree than other constitutionally guaranteed expression such as a political speech. *Id.* at 562-63. In *Central Hudson*, the Supreme Court articulated the now-familiar four part test for evaluating the constitutionality of a content-neutral regulation of commercial speech: First, the court must determine whether the speech is lawful and not misleading, otherwise it is outside the First Amendment's protection. *Id.* at 566. If the speech is neither misleading or unlawful, then the court must ascertain whether the government has asserted a substantial interest. *Id.* If the government has asserted a substantial interest, then a court must evaluate whether the regulation directly advances the asserted governmental interest and whether it is more extensive than necessary to serve that interest. *Id.*

UT's anti-solicitation and anti-spam policies easily survive a constitutional challenge under *Central Hudson*. No one disputes White Buffalo's spam was neither misleading nor unlawful. But UT has asserted a substantial government interest – namely, managing and blocking the unsolicited commercial email the university computer

system receives that ties up memory space on UT servers, expends UT resources in responding to user complaints, and disrupts the work of UT students, faculty and staff. As Congress documented in the legislative history of the CAN-SPAM Act, the volume of spam has been increasing rapidly and as of 2003, accounted for more than 46% of all global email traffic. S. Rep. 108-102, at 2. Congress cited a *USA Today* report anticipating more than two trillion spam messages would be sent over the Internet in 2003. *Id.* at 3. And Congress specifically recognized that "the sheer volume of spam is threatening to overwhelm not only the average consumer's in-box, but also the network systems of ISPs, businesses, *universities*, and other organizations." *Id.* at 3 (emphasis added). As a consequence, large ISPs like America Online, Microsoft and Earthlink block billions of incoming spam messages a day. *Id.* Congress also recounted spam's economic impact on ISPs, consumers and the workplace:

> Spam imposes significant economic burdens on ISPs, consumers, and businesses. Left unchecked at its present rate of increase, spam may soon undermine the usefulness and efficiency of e-mail as a communications tool. Massive volumes of spam can clog a computer network, slowing Internet service for those who share that network. ISPs must respond to rising volumes of spam by investing in new equipment to increase capacity and customer service personnel to deal with increased subscriber complaints. ISPs also face high costs maintaining e-mail filtering systems and other anti-spam technology on their networks to reduce the deluge of spam. Increasingly, ISPs are also undertaking extensive investigative and legal efforts to track down and prosecute those who send the most spam, in

some cases spending over a million dollars to find and sue a single, heavy-volume spammer.

Though major service providers tend to disagree about the overall monetary impact spam has had on their respective networks, anti-spam initiatives cost providers time and money, and those expenses typically have been passed on as increased charges to consumers. A 2001 European Union study found that spam cost Internet subscribers worldwide $9.4 billion each year, and USA Today reported in April that research organizations estimate that fighting spam adds an average of $2 per month to an individual's Internet bill. Additionally, some observers expect that free e-mail services (often used by students and employees who obtain free Internet access) will be downsized as the costs of spam increase, which may result in consumers facing significant "switching costs" as they are forced to migrate to subscription-based services. As reported by the Boston Globe, industry analysts are concerned that this trend could influence millions of consumers to abandon the use of e-mail messaging as a viable means of communication.

* * *

In addition to the costs to ISPs and consumers, recent industry research has focused on the impact of spam's growth on businesses and e-commerce. Ferris Research currently estimates that costs to United States businesses from spam in lost productivity, network system upgrades, unrecoverable data, and increased personnel costs, combined, will top $10 billion in 2003. Of that total, Ferris estimates that employee productivity losses from sifting through and deleting spam accounts for nearly $4 billion alone. Recent

> press reports also indicate that large companies with corporate networks typically spend between $1 to $2 per user each month to prevent spam, which is currently estimated to make up 24 percent of such corporations' inbound e-mail. At current growth rates, however, spam could account for nearly 50 percent of all inbound e-mail to large corporations by 2004. Ferris reports that corporate costs of fighting spam today represent a 300 percent increase from 2 years ago, and the Yankee Group estimates that costs to corporations could reach $12 billion globally within the next 18 months. Based on current spam growth rates, the Radicati Group estimates that, on a worldwide basis, spam could cost corporations over $113 billion by 2007.

Id. at 6-7. UT, like the corporations mentioned in this excerpt, also has an interest in safeguarding the time and productivity of its employees and students by limiting the amount of unsolicited bulk mailings to which they are subjected. State universities have a substantial interest in protecting their networks and servers from the ever-increasing deluge of spam and therefore, UT has asserted a substantial government interest.

While UT's system for stopping spam, which involves commercial filters, responding to user complaints, and installing ISP-specific filters, could not be considered perfectly tailored in that it most likely blocks some solicited email and misses some spam, it is sufficiently tailored in light of the quantity of users and spam with which it deals and in light of the technology currently available. As such, UT's policies do not run afoul of *Central Hudson* and the Court will not enjoin UT from blocking White Buffalo's

email messages to utexas.edu since White Buffalo will not commit to stop spamming utexas.edu addresses.[5]

D. Public or Non-Public Forum

UT, citing *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), also argues its information technology network constitutes a non-public forum and thus UT can impose more stringent limitations on speech than it would be able to under *Central Hudson*. In *Perry*, the Supreme Court held a public school system's internal mail system did not constitute a state-created public forum and therefore the school board could reserve the forum for its intended purposes, communicative or otherwise, as long as it did not discriminate on the basis of viewpoint and the limitations it imposed were reasonable in light of the purpose served by the forum. The Supreme Court concluded the *Perry* mail system was established to transmit official messages and facilitate communication between teachers and school administration. *Id.* at 39. The fact that teachers could use the system for personal mail and could receive some messages from private organizations did not render the system a non-public forum because there had never been any indication the mail system

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[5] White Buffalo argues UT is effectively cutting off the company's correspondence with its customers since emails to customers with utexas.edu addresses are blocked, even if White Buffalo is responding to that customer's email. However, the customers can communicate with White Buffalo through other email accounts, including free services such as Microsoft Hotmail or Yahoo. Moreover, UT would permit correspondence from the White Buffalo IP address to utexas.edu addresses if White Buffalo would promise to stop spamming UT – that is, promise to stop sending tens of thousands of unsolicited email messages promoting LonghornSingles.com at a time to the university community.

was open to use by the general public. *Id.* at 47. UT contends *Perry* controls in this case because a its information technology network is primarily designed to further interests of the university and to facilitate communication between university community members. *See* UT ITS Anti-Spam Notices and Procedures (stating the "online directory service is provided by the University to facilitate the research, teaching, learning, and service missions of the University Community"). According to UT, the fact its network users can send and receive email to those outside the system does not render the network public, just as the teacher's use of the mail system for some private correspondence did not render the internal mail system in *Perry* private. UT emphasizes it does not offer email accounts to members of the general public, it only offers them to students and employees of the university. Updegrove Decl. ¶ 7.

There is some authority for the proposition that a state university's email system, even a large state university's, is a non-public forum. *See Loving v. Boren*, 956 F.Supp. 953 (W.D.Okla.1997) (holding the University of Oklahoma computer and Internet services do not constitute a public forum because they are lawfully dedicated to academic and research uses and the state has as much of a right as a private owner of property to preserve its property for the use for which it was dedicated), *aff'd on alternate grounds*, 133 F.3d 771 (10th Cir.1998). However, because the Court has upheld the validity of UT's non-solicitation rules and anti-spam policy under the *Central Hudson* test, which is that test that applies even assuming UT's network is a public forum, it is unnecessary for the Court to decide the question of whether UT's network constitutes a non-public forum.

E. Equal Protection Claim

Finally, White Buffalo maintains UT violated its rights under the Equal Protection Clause of the Fourteenth Amendment by blocking LonghornSingles.com email traffic because UT does not block all unsolicited commercial email. White Buffalo does not contend UT blocked its email because it (or those who run it) is a member of a suspect class or because it invoked a constitutional right. Therefore, in order to state a claim that its rights under the Equal Protection Clause were violated, White Buffalo must allege it was treated differently from others who were similar situated without any rational basis for the differential treatment. *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir.1999); *see also Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (clarifying that equal protection claims can be brought by a "class of one" without allegation of race or other class-based animus "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."). However, as the Court discussed above, UT's policy is to block all incoming spam of which it is aware. Admittedly, it does not block all spam due to imperfections in its systems of detection but it has a policy to block all spam brought to its attention. As such, there is a rational basis for any alleged differential treatment between White Buffalo and any spammer who has thus far gone undetected.

In accordance with the foregoing:

IT IS ORDERED that Plaintiff's Motion for Summary Judgment [#38] is DENIED and Defendant's Motion for Summary Judgment [#44] is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Oral Argument of Its Motion for Summary Judgment [#46] is DISMISSED AS MOOT in light of the oral argument held by this Court on March 9, 2004.

SIGNED this the 22nd day of March 2004.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHITE BUFFALO VENTURES, LLC

Plaintiff,

-vs-

Case No.
A-03-CA-296-SS

THE UNIVERSITY OF TEXAS AT AUSTIN,

Defendant.

JUDGMENT

BE IT REMEMBERED on the 22nd day of March 2004 the Court entered its order granting summary judgment on behalf of the defendant and now enters the following:

> IT IS ORDERED, ADJUDGED, and DECREED that the plaintiff White Buffalo Ventures, L.L.C. TAKE NOTHING in this cause against the defendant The University of Texas at Austin, and that all costs of suit are taxed against the plaintiff, for which let execution issue.

SIGNED this the 22nd day of March 2004.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

APPENDIX C

Responsible Use of Information Technology

VI. What is NOT against law or policy?

Some things that you might think should be against UT's information technology guidelines may not be. Before you report what you believe is an incident of misuse, please read this section carefully. It is written primarily for those planning to report what they believe to be an infraction of law or policy.

- **First Amendment rights.**

  In general, expressions of opinion by members of the University community that do not otherwise violate state and federal laws or University rules are protected as "free speech." This is true even though the opinions expressed may be unpopular or offensive to some. With a population of 67,000, UT encompasses a wide array of opinions and views. We encourage all those associated with the University to exercise their constitutional rights and freedoms responsibly. We do not, however, punish people who express views that may be unpopular or offensive, but who break no laws or University rules while doing so.

- **"Spam," unsolicited and unwanted e-mail, and other junk mail from a source outside UT.**

  Many people are annoyed by junk mail such as "spam" and other kinds unsolicited or unwanted e-mail. If the offending e-mail is against UT rules, ITS Information Technology Security and Policy Office investigates the report and takes appropriate action.

It is not unusual, though, for junk mail to originate from a source outside the University. In most such cases, the University has little control. You, however, as the recipient have a great deal of control.

1. You can ignore or delete the junk mail.
2. You can write the administrator of the Internet service provider from which the e-mail was sent. (See ***Section VII.***)
3. You can *filter your e-mail* so the offending mail is filed unread in a junk mail file, allowing you to delete it at your leisure. See *Avoiding Spam*. Specific questions about filtering can be addressed to the *ITS Help Desk*
4. Responsibly administered mailing lists will remove your name from their subscriber list if you ask them to do so. Not all lists, however, will honor your request.

Repeated incidents involving offensive e-mail may become harassment. If you feel this is occurring, write ***abuse@utexas.edu***. If you feel threatened, call UT Police, 471-4441.